

OCT 18 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LEONARDO TORRES-ORTIZ, aka
Leonardo Ortiz Torres aka Leonardo
Torres Ortiz,

Defendant - Appellant.

No. 04-17236

D.C. No. CV-04-6068-REC

MEMORANDUM^{*}

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, Senior Judge, Presiding

Submitted October 11, 2005^{**}

Before: T.G. NELSON, WARDLAW and TALLMAN, Circuit Judges.

Federal prisoner Leonardo Torres-Ortiz appeals the district court's denial of

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

his 28 U.S.C. § 2255 motion to vacate or correct his sentence for conspiracy, and possession of a controlled substance with intent to distribute. Under *United States v. Booker*, 125 S. Ct. 738 (2005), and *Blakely v. Washington*, 542 U.S. 296 (2004), Torres-Ortiz contends that the district court erred in enhancing his sentence based on judge-found facts. Torres-Ortiz's conviction was final as of the dates the *Booker* and *Blakely* decisions were issued. Torres-Ortiz's claim is foreclosed because, as we recently held, "*Booker* does not apply retroactively to convictions that became final prior to its publication." *United States v. Cruz*, No. 03-35873, 2005 WL 2243113, at *1 (9th Cir. Sept. 16, 2005). *See also, Schardt v. Payne*, 414 F.3d 1025, 1036 (9th Cir. 2005) (holding in a 28 U.S.C. § 2254 habeas action that *Blakely* does not apply retroactively to cases on collateral review). Consequently, we affirm the district court.

AFFIRMED.